

ORAL ARGUMENT NOT SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

<u>STATE OF TEXAS, <i>et al.</i>,</u>)	
)	
Petitioners,)	
)	
)	
v.)	No. 16-1078 (and
)	consolidated cases)
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i>,)	
)	
Respondents.)	

STATUS REPORT

Pursuant to the Court's May 1, 2017, Order (Doc. #1673454), EPA submits the following status report.

1. These cases concern EPA's final action under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, titled: "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze" (hereinafter the "Final Rule"). The Final Rule was published at 81 Fed. Reg. 296 (Jan. 5, 2016).

2. As the Parties previously reported, *see* Doc. #1672209 at 4, on July 15, 2016, a motions panel of the United States Court of Appeals for the Fifth Circuit denied a motion to dismiss or transfer to this Court petitions for review of the Final Rule filed in the Fifth Circuit. The Fifth Circuit determined that both subject matter jurisdiction and venue properly lie in that court. *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016).

3. As the Parties also previously reported, *see* Doc. #1672209 at 5, on March 22, 2017, the same panel of the Fifth Circuit granted EPA's motion for a partial voluntary remand of the Final Rule. The Fifth Circuit placed proceedings in that court on the petitions for review of the Final Rule in abeyance pending EPA's reconsideration of the Final Rule on remand.

4. On April 21, 2017, the Parties filed a Joint Unopposed Motion to Govern Further Proceedings, in which the Parties moved this Court to continue to hold these petitions in abeyance pending the ultimate outcome of any appeal on the jurisdictional and venue issue in the Fifth Circuit or the Supreme Court. Doc. #1672209.

5. On May 1, 2017, this Court issued an Order holding these cases in abeyance and directing the Parties to file status reports at 120-day intervals beginning August 29, 2017. Doc. #1673454. The Court further ordered the Parties to file motions to govern within 30 days of the disposition of the petitions for review in the Fifth Circuit.

6. EPA now provides the following status update to the Court. As EPA has also explained to the Fifth Circuit, the initial significant action EPA will take on remand is to publish a notice of proposed rulemaking proposing to reconsider certain aspects of the Final Rule regarding the CAA's reasonable progress requirements. *See* 42 U.S.C. § 7607(d)(7)(B). As EPA has also previously explained, EPA's intent has been to first publish a final rule on the related but separate CAA Best Available Retrofit Technology ("BART") requirements. EPA's notice of proposed rulemaking regarding the BART requirements was published in the *Federal Register* on January 4, 2017. 82 Fed. Reg. 912 (Jan. 4, 2017). EPA's BART final rule was published in the *Federal Register* on October 17, 2017. 82 Fed. Reg. 48,324 (Oct. 17, 2017).

7. EPA's BART final rule has been challenged in the Fifth Circuit in *Nat'l Parks Conservation Ass'n, et al. v. EPA*, Case No. 17-60828 (5th Cir.). Those same petitioners have also filed an administrative petition with EPA requesting that EPA reconsider the BART final rule. The Fifth Circuit has held the proceedings in that case in abeyance pending the resolution of the petition for reconsideration and the completion of any reconsideration process of the BART final rule.

8. The plaintiffs in *National Parks Conservation Ass'n, et al. v. Wheeler*, No. 1:11-cv-01548 (ABJ) (D.D.C.), and EPA disagree as to whether EPA's BART final rule satisfies the terms of a consent decree that was entered in that case, whether it is consistent with the CAA, and whether the question of whether it is consistent with the CAA is properly raised in the district court, or may be presented only in the

appropriate court of appeals. However, the district court proceedings are being held in abeyance pending the resolution of the administrative petition for reconsideration of the BART final rule and/or resolution of the petition for review of the BART final rule discussed in paragraph 7 above.

9. On April 30, 2018, EPA announced its intention to convene a new rulemaking proceeding to solicit public comment on certain aspects of the BART final rule. On August 27, 2018, EPA published a notice of proposed rulemaking proposing to affirm its October 17, 2017 BART final rule, and providing an opportunity for public comment on the proposal and other specified related issues. 83 Fed. Reg. 43,586 (Aug. 27, 2018). EPA held a public hearing in Austin, Texas, on the proposed rulemaking on September 26, 2018. The public comment period on the proposed action closed on October 26, 2018. EPA received approximately 1,500 comment letters and emails from citizens, environmental groups, industry and States.

10. Prior to December 28, 2018, EPA had been reviewing the comments it received on the August 27, 2018, notice of proposed rulemaking, in preparation to draft responses to the comments. On December 28, 2018, the appropriation account that was funding this work lapsed. January 28, 2019, was the first business day that funding was restored to EPA. EPA has resumed this work now that funding has been restored.

11. Accordingly, agency proceedings on remand of the Final Rule are ongoing and these cases should therefore remain in abeyance.

12. Counsel for EPA has coordinated this status report with counsel for all other parties.

13. The next status report is due to be filed on or before July 30, 2019.

Respectfully submitted,

DATED: April 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Status Report was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: April 1, 2019

/s/ David A. Carson
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